

THE DUTY TO DISOBEY ILLEGAL NUCLEAR STRIKE ORDERS

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I. INTRODUCTION

In this essay, Anthony Colangelo argues that: “There is a legal duty to disobey illegal nuclear strike orders. Failure to carry out this duty may result in criminal and civil liability under national and international law... [T]hose ordered to plan or launch a nuclear strike are on notice: An order to use a nuclear weapon instead of a conventional weapon where the same military advantage can be gained by either gives rise to a duty to reject that order. To do otherwise and follow the order would constitute a war crime for which the actor could be held liable.” This legal duty under international law applies to *all* personnel in *all* nuclear weapons and nuclear umbrella states involved in nuclear strikes; and *also* to non-state actors.

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The full version of this paper can be found in PDF format [0.4MB] on SSRN [here](#). Readers are encouraged to read and submit comments (see section III below).

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Banner image: Men, women, and children arriving by train under Nazi guard at Auschwitz-Birkenau concentration and extermination camp. Photo from the Auschwitz Album [here](#).

II. NAPSNET POLICY FORUM ESSAY BY ANTHONY J. COLANGELO

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There is a legal duty to disobey illegal nuclear strike orders. Failure to carry out this duty may result in criminal and civil liability under national and international law.

This duty to disobey originates in the law’s rejection of the defense of what is typically referred to as “superior orders.” Colloquially put, the defense goes something like this: “I cannot be liable for carrying out an illegal act because I was simply following orders.” At least since the Nazis were prosecuted for war crimes and crimes against humanity at Nuremberg, this defense has largely disintegrated.

But how to tell whether the order is of the magnitude of illegality for which personnel can be held liable? The answer is that under both international and U.S. law, the order must be “manifestly” or “clearly” illegal, not just of debatable or arguable legality. What this means is that the person

ordered to launch or to plan the launch knows or should know that the order is illegal. The U.S. Department of Defense Manual cites as an example firing on the shipwrecked. An order to shoot a baby in the head also would qualify.

The law of war, or what's called humanitarian law, as well as human rights law, contain a group of principles designed to protect civilian life and reduce suffering, including the principle of distinction between combatants and innocent civilians (an attack cannot indiscriminately target both), proportionality in attack, military necessity, the prevention of unnecessary suffering and superfluous injury, as well as the prevention of arbitrary loss of life. But these bodies of law also contemplate that, inevitably, in armed conflict there will be civilian death and suffering. When it comes to conventional (non-nuclear) weapons, we have a body of case law from which to draw so as to discern when a particular strike is illegal under the laws of war and constitutes a war crime; when it comes to nuclear weapons, on the other hand, we are paving new ground.

Because nuclear weapons are quantitatively and qualitatively different from conventional weapons in many respects, the legal analysis is also different. And because nuclear weapons are more catastrophic than conventional weapons, any time the same or similar military advantage can be gained by using a conventional as opposed to a nuclear weapon, the nuclear option will cause far more civilian death and suffering. As such, it constitutes a serious violation of international law and following such an order is, in turn, a war crime for which actors can be held liable.

At least five unique characteristics ominously separate nuclear weapons from conventional weapons in ways that promise only to increase civilian death and suffering. First, quantitatively, the blast power, heat, and energy generated far outstrip that of conventional weapons. Second, radiation released is so powerful that it damages DNA and causes death and severe health defects throughout the entire lives of survivors as well as their children exposed in utero. Third, nuclear weapons make virtually impossible humanitarian assistance to survivors at the blast scene struggling to survive, leading to more suffering and death. Fourth, damage to the environment causes not only devastating environmental harm itself but also widespread famine and starvation. And fifth, nuclear weapons cause long-lasting multi-generational psychological injury to survivors of the blast. All of these factors weigh heavily against the humanitarian goals of the law of war, which again is designed chiefly to prevent and reduce civilian death and suffering.

So those ordered to plan or launch a nuclear strike are on notice: An order to use a nuclear weapon instead of a conventional weapon where the same military advantage can be gained by either gives rise to a duty to reject that order. To do otherwise and follow the order would constitute a war crime for which the actor could be held liable.

This duty to disobey an illegal nuclear strike order constitutes an underappreciated but powerful legal norm with far-reaching implications for humanitarian law and practice, diminishing in some scenarios the use of nuclear weapons to the vanishing point under the law. In this connection, it also constitutes a powerful counter-norm that argues against the use of nuclear weapons as a matter of policy and strategic decision-making. The overall import of the combination of these norms and counter-norms is to marginalize nuclear weapons as having no meaningful place near a civilian population in the conduct of hostilities under international law and within the international legal system generally.

III. NAUTILUS INVITES YOUR RESPONSE

The Nautilus Asia Peace and Security Network invites your responses to this report. Please send responses to: nautilus@nautilus.org. Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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